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Supreme Court, U.S.
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No. 10-387

IN THE

Supreme Court of the United States

STATE OF MISSOURI,
Petitioner,

v.

MIGUEL VACA,
Respondent.

On Petition For a Writ of Certiorari
To the Supreme Court of Missouri

REPLY BRIEF

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PETITIONER'S REPLY

1. Vaca's response advocates for the same type of per se prejudice rule that the Missouri Supreme Court effectively adopted in it's opinion.

The Missouri Supreme Court ordered a new jury sentencing trial for Miguel Vaca after finding that his trial counsel was ineffective for failing to consider whether to present available evidence of Vaca's mental health impairments at the original trial's sentencing phase. (Cert. Pet. App., pp. A13-A14). In issuing that order, the court failed to consider whether a reasonable probability existed that presenting that evidence would have changed the outcome of the sentencing phase. Instead, the court expressly found that the unpresented evidence could have embittered the jury, and it emphasized that counsel was not required to offer the evidence in a new sentencing proceeding, but need only consider whether or not to do so. (Cert. Pet. App., pp. A12-A13).

Vaca argues that the Missouri Supreme Court correctly applied the standard set forth by this Court in *Strickland v. Washington*, 466 U.S. 668 (1984) for granting relief on claims of ineffective assistance of counsel. But Vaca's argument is just as flawed as the opinion that he defends. He focuses almost entirely on *Strickland*'s performance prong and either ignores or gives short shrift to the prejudice prong. Vaca's argument, in essence, is that prejudice automatically flows from counsel's failure to make a strategic choice on whether or not to present evidence in the sentencing phase of a trial.

That is most clearly demonstrated in subpart two of Vaca's brief, which attempts to distinguish the cases cited by Petitioner on the basis that counsel in those cases made a strategic choice not to present "double-edged sword" evidence. In fact the opening paragraph of that subsection contains the following: "Simply put, the 'double-edged sword' principle at play in the cases cited by the state has no application where, as in Mr. Vaca's case, defense counsel confirms that he made no strategic decision to forego the omitted evidence." (Brf. in Opp., p. 24). That statement misses the point, as does Vaca's attempts to distinguish the cases cited in the petition. Whether counsel did or did not make a strategic decision is relevant to the performance prong of the *Strickland* standard but has no bearing on whether counsel's deficiencies resulted in prejudice.

While the Missouri Supreme Court effectively eliminated the required showing of prejudice in its analysis, Vaca misconstrues the *Strickland* standard by repeatedly conflating the performance and prejudice prongs. The court found that trial counsel failed to meet the performance prong of the *Strickland* standard by not making a strategic choice whether or not to present the mental health evidence available to him. (Cert. Pet. App., p A12). Petitioner takes no issue with that finding. But the inquiry cannot end there. *Strickland* made clear that performance and prejudice are separate inquiries and that prejudice must be affirmatively proven before relief can be granted on an ineffective assistance of counsel claim. *Strickland*, 466 U.S. at

691, 693.[1] Where the Missouri Supreme Court went wrong, and where Vaca goes wrong in his brief, is in reaching the inherent conclusion that prejudice naturally flows from counsel's failure to make a strategic decision and that a defendant in such cases need not affirmatively show the existence of a reasonable probability that the jury would have returned with a different sentence had the evidence been presented. *See Wong v. Belmontes*, 130 S. Ct. 383, 386 (2009).

While Vaca claims that the Missouri Supreme Court's decision is consistent with this Court's opinion in *Sears v. Upton*, 130 S. Ct. 3259 (2009), that opinion actually demonstrates why certiorari should be granted. This Court granted certiorari and vacated the judgment in *Sears* because the Georgia Supreme Court failed to apply the proper prejudice inquiry despite stating the proper standard from *Strickland*. *Id.* at 3261, 3264. Specifically, the Georgia court failed to consider newly discovered mitigation evidence and assess whether a reasonable probability existed that the defendant would have received a different sentence had a competent mitigation investigation been conducted. *Id.* at 3267.

The Missouri Supreme Court in this case was obligated to consider the evidence that was known to counsel but not presented at the sentencing hearing, and assess whether a reasonable probability existed that Vaca would have received a different sentence had that evidence been presented. While the court performed the first part of that analysis by

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[1] In the absence of prejudice, the reviewing court need not even consider the adequacy of counsel's performance. *Id.* at 697.

considering the evidence, it then erroneously cut the analysis short and failed to make the required finding of a reasonable probability of a different sentence had the evidence been presented. The court's conclusory statement that trial counsel's failure to consider presenting the evidence undermined confidence in the outcome is insufficient to establish prejudice in the absence of a finding of a reasonable probability of a different result had the evidence been presented.

Vaca tries to avoid the court's lack of the required prejudice finding by arguing that it was inherent in the court's decision. (Brf. in Opp., p. 14). The express language of the opinion refutes that assertion. The court stated that while the unpresented evidence could be helpful to Vaca, it might also have embittered the jury. (Cert. Pet. App., p. A12). And the court specifically directed that trial counsel did not have to attempt to admit the mental health evidence in a new sentencing proceeding, but need only consider whether or not to admit it. (Cert. Pet. App., p. A13). Those statements contradict any finding, express or inherent, that the unpresented evidence created a reasonable probability of a different sentence.

And the dissent took note of that language in finding that the majority opinion failed to apply the prejudice standard articulated in *Strickland*. The dissent correctly noted that the majority's "speculative" finding that the unpresented evidence may have helped Vaca but may also have hurt him was insufficient to prove prejudice under the standard set forth in *Strickland*. (Cert. Pet. App., p.A15). The dissent properly concluded that Vaca failed to meet the prejudice requirement because he

failed to demonstrate a reasonable probability that the result of the proceeding would have been different had the mental health evidence been presented. (Cert. Pet. App., p. A18).

2. Petitioner is not attempting to impose a presumption of no prejudice from the failure to present "double-edged" mental health evidence.

Vaca concludes his brief by accusing Petitioner of trying to create a presumption that the failure to present evidence that is double-edged in nature can never be prejudicial. That is not the case. It is entirely possible for a reviewing court to conclude after carefully reviewing the evidence that its mitigating value sufficiently outweighs its aggravating value such that a reasonable probability exists that presenting the evidence would result in a different sentence. But the Missouri Supreme Court did not make that finding. It instead granted relief despite acknowledging that counsel might not want to present the mental health evidence due to its potentially harmful nature. (Cert. Pet. App. at A12-A13). That is an improper application of *Strickland* that, while not specifically labeled as such, amounts to a finding of per se prejudice from the failure to consider presenting the evidence.

Like the Georgia Supreme Court that was reversed by this Court in *Sears*, the Missouri Supreme Court in Vaca's case stated the proper standard for determining the existence of prejudice, but wholly failed to apply that standard. For the reasons stated in the Petition for Writ of Certiorari, the Missouri Supreme Court's opinion has the

potential to set a precedent in the field of ineffective assistance of counsel claims in non-capital sentencing proceedings. That precedent is contrary to the standards set by this Court and, if followed by other courts, would lead those courts into error. Granting certiorari will ensure that future claims of ineffective assistance of counsel in non-capital sentencing proceedings are resolved consistently with this Court's precedents.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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